

LEGISLATIVE BILL 1094

Approved by the Governor April 13, 2010

Introduced by Lathrop, 12; Lautenbaugh, 18.

FOR AN ACT relating to consumer protection; to amend section 84-907.03, Revised Statutes Supplement, 2009; to adopt the Nonrecourse Civil Litigation Act; to provide powers and duties for the Secretary of State; to harmonize provisions; and to repeal the original section.
Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 9 of this act shall be known and may be cited as the Nonrecourse Civil Litigation Act.

Sec. 2. For purposes of the Nonrecourse Civil Litigation Act:

(1) Civil litigation funding company means a person or entity that enters into a nonrecourse civil litigation funding transaction with a consumer;

(2) Consumer means a person residing or domiciled in Nebraska or who elects to enter into a transaction under the act, whether it be in person, over the Internet, by facsimile, or by any other electronic means, and who has a pending legal claim and is represented by an attorney at the time he or she receives the nonrecourse civil litigation funding;

(3) Legal claim means a civil claim or action; and

(4) Nonrecourse civil litigation funding means a transaction in which a civil litigation funding company purchases and a consumer assigns the contingent right to receive an amount of the potential proceeds of the consumer's legal claim to the civil litigation funding company out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the legal claim.

Sec. 3. (1) All contracts for nonrecourse civil litigation funding shall comply with the following requirements:

(a) The contract shall be completely filled in and contain on the front page, appropriately headed and in at least twelve-point bold type, the following disclosures:

(i) The total dollar amount to be funded to the consumer;

(ii) An itemization of one-time fees;

(iii) The total dollar amount to be repaid by the consumer, in six-month intervals for thirty-six months, and including all fees;

(iv) The total dollar amount in broker fees that are involved in the transaction; and

(v) The annual percentage rate of return, calculated as of the last day of each six-month interval, including frequency of compounding;

(b) The contract shall provide that the consumer may cancel the contract within five business days following the consumer's receipt of funds without penalty or further obligation. The contract shall contain the following notice written in a clear and conspicuous manner: "CONSUMER'S RIGHT TO CANCELLATION: YOU MAY CANCEL THIS CONTRACT WITHOUT PENALTY OR FURTHER OBLIGATION WITHIN FIVE BUSINESS DAYS FROM THE DATE YOU RECEIVE FUNDING FROM (insert name of civil litigation funding company)." The contract also shall specify that in order for the cancellation to be effective, the consumer shall either return the full amount of disbursed funds to the civil litigation funding company by delivering the civil litigation funding company's uncashed check to the civil litigation funding company's offices in person, within five business days after the disbursement of funds, or mail a notice of cancellation and include in that mailing a return of the full amount of disbursed funds in the form of the civil litigation funding company's uncashed check or a registered or certified check or money order, by insured, registered, or certified United States mail, postmarked within five business days after receiving funds from the civil litigation funding company, to the address specified in the contract for the cancellation;

(c) The contract shall contain the following statement in at least twelve-point boldface type: "THE CIVIL LITIGATION FUNDING COMPANY AGREES THAT IT SHALL HAVE NO RIGHT TO AND WILL NOT MAKE ANY DECISIONS WITH RESPECT TO THE CONDUCT OF THE UNDERLYING LEGAL CLAIM OR ANY SETTLEMENT OR RESOLUTION THEREOF AND THAT THE RIGHT TO MAKE THOSE DECISIONS REMAINS SOLELY WITH YOU AND YOUR ATTORNEY IN THE LEGAL CLAIM.";

(d) The contract shall contain an acknowledgement by the consumer that such consumer has reviewed the contract in its entirety;

(e) The contract shall contain the following statement in at least twelve-point boldface type located immediately above the place on the contract where the consumer's signature is required: "DO NOT SIGN THIS CONTRACT BEFORE

YOU READ IT COMPLETELY OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS CONTRACT. BEFORE YOU SIGN THIS CONTRACT YOU SHOULD OBTAIN THE ADVICE OF AN ATTORNEY. DEPENDING ON THE CIRCUMSTANCES, YOU MAY WANT TO CONSULT A TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL PROFESSIONAL. YOU ACKNOWLEDGE THAT YOUR ATTORNEY IN THE LEGAL CLAIM HAS PROVIDED NO TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL ADVICE REGARDING THIS TRANSACTION.";

(f) The contract shall contain a written acknowledgment by the attorney representing the consumer in the legal claim that states all of the following:

(i) The attorney representing the consumer in the legal claim has reviewed the contract and all costs and fees have been disclosed including the annualized rate of return applied to calculate the amount to be paid by the consumer;

(ii) The attorney representing the consumer in the legal claim is being paid on a contingency basis per a written fee agreement;

(iii) All proceeds of the civil litigation will be disbursed via the trust account of the attorney representing the consumer in the legal claim or a settlement fund established to receive the proceeds of the civil litigation from the defendant on behalf of the consumer;

(iv) The attorney representing the consumer in the legal claim is following the written instructions of the consumer with regard to the nonrecourse civil litigation funding;

(v) The attorney representing the consumer in the legal claim shall not be paid or offered to be paid commissions or referral fees; and

(vi) Whether the attorney representing the consumer in the legal claim does or does not have a financial interest in the civil litigation funding company; and

(g) All contracts to the consumer shall have in plain language, in a box with bold fifteen-point font stating the following in capitalized letters: "IF THERE IS NO RECOVERY OF ANY MONEY FROM YOUR LEGAL CLAIM OR IF THERE IS NOT ENOUGH MONEY TO PAY THE CIVIL LITIGATION FUNDING COMPANY BACK IN FULL, YOU WILL NOT OWE THE CIVIL LITIGATION FUNDING COMPANY ANYTHING IN EXCESS OF YOUR RECOVERY UNLESS YOU HAVE VIOLATED THIS PURCHASE AGREEMENT."

(2) If a dispute arises between the consumer and the civil litigation funding company concerning the contract for nonrecourse civil litigation funding, the responsibilities of the attorney representing the consumer in the legal claim shall be no greater than the attorney's responsibilities under the Nebraska Rules of Professional Conduct.

Sec. 4. (1) The civil litigation funding company shall not pay or offer to pay commissions or referral fees to any attorney or employee of a law firm or to any medical provider, chiropractor, or physical therapist or their employees for referring a consumer to the civil litigation funding company.

(2) The civil litigation funding company shall not accept any commissions, referral fees, or rebates from any attorney or employee of a law firm or any medical provider, chiropractor, or physical therapist or their employees.

(3) The civil litigation funding company shall not advertise false or intentionally misleading information regarding such company's product or services.

(4) The civil litigation funding company shall not knowingly provide nonrecourse civil litigation funding to a consumer who has previously sold and assigned an amount of such consumer's potential proceeds from the legal claim to another civil litigation funding company without first buying out that civil litigation funding company's entire accrued balance unless otherwise agreed in writing by the civil litigation funding companies and the consumer.

Sec. 5. (1) A civil litigation funding company may not assess fees for any period exceeding thirty-six months from the date of the contract with the consumer.

(2) Fees assessed by the civil litigation funding company shall compound at least semiannually but shall not compound based on any lesser time period.

(3) In calculating the annual percentage fee or rate of return, a civil litigation funding company shall include all charges payable directly or indirectly by the consumer and shall compute the rate based only on amounts actually received and retained by a consumer.

Sec. 6. No communication between the attorney and the civil litigation funding company as it pertains to the nonrecourse civil litigation funding contract shall limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.

Sec. 7. (1) Unless a civil litigation funding company has first

registered pursuant to the Nonrecourse Civil Litigation Act, the civil litigation funding company cannot engage in the business of nonrecourse civil litigation funding.

(2) A civil litigation funding company shall submit an application of registration to the Secretary of State in a form prescribed by the Secretary of State. An application filed under this subsection is a public record and shall contain information that allows the Secretary of State to make an evaluation of the character, fitness, and financial responsibility of the company such that the Secretary of State may determine that the business will be operated honestly or fairly within the purposes of the act. For purposes of determining a civil litigation funding company's character, fitness, and financial responsibility, the Secretary of State shall request a company to submit: A copy of the company's articles of incorporation, articles of organization, certificate of limited partnership, or other organizational documents; proof of registration with a Nebraska registered agent; and proof of a surety bond or irrevocable letter of credit issued and confirmed by a financial institution authorized by law to transact business in the State of Nebraska that is equal to double the amount of the largest funding in the past calendar year or fifty thousand dollars, whichever is greater.

(3) A civil litigation funding company may apply to renew a registration by submitting an application for renewal in a form prescribed by the Secretary of State. An application filed under this subsection is a public record. The registration shall contain current information on all matters required in an original registration.

Sec. 8. (1) An application for registration or renewal of registration under section 7 of this act shall be accompanied by either an application for registration fee or a renewal of registration fee, as applicable.

(2) The Secretary of State may, by rule and regulation, establish fees for applications for registration and renewals of registration at rates sufficient to cover the costs of administering the Nonrecourse Civil Litigation Act, in the event any such fees are required. Such fees shall be collected by the Secretary of State and remitted to the State Treasurer for credit to the Secretary of State Administration Cash Fund.

Sec. 9. (1) The Secretary of State shall issue a certificate of registration to a civil litigation funding company who complies with subsection (2) of section 7 of this act or a renewal of registration under subsection (3) of section 7 of this act.

(2) The Secretary of State may refuse to issue a certificate of registration if the Secretary of State determines that the character, fitness, or financial responsibility of the civil litigation funding company are such as to warrant belief that the business will not be operated honestly or fairly within the purposes of the Nonrecourse Civil Litigation Act.

(3) The Secretary of State may suspend, revoke, or refuse to renew a certificate of registration for conduct that would have justified denial of registration under subsection (2) of section 7 of this act or for violating section 4 of this act.

(4) The Secretary of State may deny, suspend, revoke, or refuse to renew a certificate of registration only after proper notice and an opportunity for a hearing. The Administrative Procedure Act applies to the Nonrecourse Civil Litigation Act.

(5) The Secretary of State may issue a temporary certificate of registration while an application for registration or renewal of registration is pending.

(6) The Secretary of State shall require a civil litigation funding company registered pursuant to the act to annually submit certain data, in a form prescribed by the Secretary of State that contains:

(a) The number of nonrecourse civil litigation fundings;

(b) The amount of nonrecourse civil litigation fundings;

(c) The number of nonrecourse civil litigation fundings required to be repaid by the consumer;

(d) The amount charged to the consumer, including, but not limited to, the annual percentage fee charged to the consumer and the itemized fees charged to the consumer; and

(e) The dollar amount and number of cases in which the realization to the civil litigation funding company was less than contracted.

(7) The Secretary of State shall annually prepare and submit a report to the Clerk of the Legislature and to the Judiciary Committee of the Legislature on the status of nonrecourse civil litigation funding activities in the state. The report shall include aggregate information reported by registered civil litigation funding companies.

Sec. 10. Section 84-907.03, Revised Statutes Supplement, 2009, is

amended to read:

84-907.03 There is hereby created the Secretary of State Administration Cash Fund. The fund shall consist of revenue received to defray costs as authorized in sections 84-901 to 84-908 and section 8 of this act. The revenue shall be collected by the Secretary of State and remitted to the State Treasurer for credit to the fund. The fund shall be used to (1) offset expenses incurred as a result of ~~such~~ sections 84-901 to 84-908, (2) administer the Address Confidentiality Act, ~~and~~ (3) administer the Nebraska Uniform Athlete Agents Act, and (4) administer the Nonrecourse Civil Litigation Act.

Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Sec. 11. Original section 84-907.03, Revised Statutes Supplement, 2009, is repealed.